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July 1, 2016

By ECFS

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Request for Review of Decision of Universal Service Administrator; WC
Docket 06-122

Dear Ms. Dortch:

Telecom Italia Sparkle of North America, Inc. (TISNA), by and through its attorneys, and pursuant to Section 54.719(b) of the Federal Communications Commission's (Commission's) rules, hereby submits a redacted version of its Request for Review of a Decision of the Universal Service Administrative Administrator.

A confidential version of the Request for Review, and a request for confidential treatment in accordance with section 0.459 of the Commission's rules, have been submitted separately via hand delivery.

Please contact the undersigned, at the contact information provided above, if you have questions regarding this Request for Review.

Respectfully submitted,



Denise N. Smith

Counsel to Telecom Italia Sparkle of North America

Enclosures

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

In the Matter of:

Telecom Italia Sparkle of North America, Inc.
(Filer ID 820676)

Request for Review
of Decision of the Universal Service
Administrator

**REQUEST FOR REVIEW
BY TELECOM ITALIA SPARKLE OF NORTH AMERICA, INC.
OF DECISION OF THE UNIVERSAL SERVICE ADMINISTRATOR**

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July 1, 2016

SUMMARY

In this appeal, Telecom Italia Sparkle of North America, Inc. (“TISNA” or the “Company”) requests review of a Universal Service Administrative Company (“USAC”) audit decision (“Final Audit Report”) seeking to reclassify TISNA’s non-U.S. telecommunications service revenues as ordinary international service revenues. The reclassification is inconsistent with the scope of the federal Universal Service program and the Federal Communication Commission’s (“FCC’s” or “Commission’s”) rules and directives. Reclassification of these foreign revenues as U.S. revenues would cause undue harm to TISNA’s business model and its long-term financial viability.

In its Audit Report, USAC found that TISNA, a global communications provider, was receiving, in the United States, the foreign-bound traffic of certain reseller customers and that TISNA should be reporting revenues from that traffic as ordinary international service revenues. However, as TISNA explains, the revenue earned from service to **[BEGIN CONFIDENTIAL]**

[END CONFIDENTIAL] (collectively, “Foreign Carrier Customers”) – (a total of **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]**) should be classified as non-U.S. telecommunications revenues.

TISNA provides international telecommunications services, on a wholesale basis, to other telecommunications carriers or carrier-like customers and neither terminates traffic in the United States nor knowingly handles traffic that originates from the United States. TISNA receives its Foreign Carrier Customers’ traffic outside of the U.S. and provides foreign termination services for that foreign-originated traffic. TISNA invoices the Foreign Carrier Customers outside of the U.S. and they in turn, bill their foreign end user customers for the service. Accordingly, as the

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Foreign Carrier Customers' traffic is received outside of the U.S. and the Foreign Carrier Customers' traffic neither originates nor terminates in the United States, the associated revenues are from non-U.S. telecommunications and are not subject to assessment by the Universal Service, Telecommunications Relay Services, North American Numbering Plan Administration, and Local Number Portability support funds.

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**REQUEST FOR REVIEW
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OF DECISION OF THE UNIVERSAL SERVICE ADMINISTRATOR**

Telecom Italia Sparkle of North America, Inc. (“TISNA”), by its attorneys, and in accordance with sections 54.719(a), 54.720(b) and 54.722 of the Federal Communications Commission’s (“Commission” or “FCC”) rules, 47 C.F.R. §§ 54.719(a), 54.720(b) and 54.722, files this Request for Review of an Audit Report (“Final Audit Report”) issued by the Universal Service Administrative Company (“USAC”) Board of Directors.¹ TISNA filed an initial appeal of the Final Audit Report with USAC on December 28, 2015.² USAC denied TISNA’s request on May 3, 2016 – as such, this Request for Review is timely filed.³

¹ See Letter from Catherine Kaylor, USAC to Joseph Rubino, TISNA (Oct. 28, 2015) (attaching Final USAC Audit Report for Telecom Italia Sparkle of North America, Inc.) (“Final Audit Report”) (Attached as Exhibit 1). The remainder of the Final Audit Report involves findings that do not increase the contribution obligation, that reduce TISNA’s contribution obligations or that involve changes that TISNA does not contest. TISNA does not appeal those findings.

² See TISNA, Request for Review of Decision of the Universal Service Administrator (Dec. 28, 2015); *see also* 47 C.F.R. § 54.719(b).

³ See Letter from USAC to Steven Augustino, Kelley Drye & Warren, LLP (May 3, 2016) (“USAC Administrator’s Decision”) (Attached as Exhibit 2); *See also* 47 C.F.R. §§ 54.719(b), 54.720(b).

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In this appeal, TISNA seeks review of USAC's reclassification of TISNA's non-U.S. telecommunications revenues as ordinary international end user revenues based on a finding that TISNA receives customer traffic inside the United States. However, the revenues of certain of TISNA's reseller customers, [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] (collectively, "Foreign Carrier Customers"), are attributable to service for the benefit of its Foreign Carrier Customers' foreign end user customers and those Foreign Carrier Customers bill their foreign end user customers for the service. Therefore these revenues are not from, or for the benefit of, domestic end users. Moreover, TISNA has determined that the revenues are almost entirely from traffic that was both received and terminated outside the U.S. Consequently, TISNA was providing non-U.S. telecommunications, not "ordinary international service," to those Foreign Carrier Customers. For the reasons discussed herein, the Commission should find that the Foreign Carrier Customer revenues are attributable to non-U.S. telecommunications traffic received and terminated outside the United States. Furthermore, all of the Foreign Carrier Customers' revenues are from service provided for the benefit of non-domestic end users and therefore are from non-U.S. telecommunications service. Consequently, these revenues properly should be reported on Line 418.3 of FCC Form 499A as non-U.S. telecommunications revenues under the Commission's rules and the FCC and should overturn USAC's audit decision.

I. BACKGROUND

A. Overview of TISNA

TISNA is a corporation formed under the laws of the State of New York with a primary place of business at 622 3rd Avenue, 38th Floor, New York, NY 10017. TISNA is a wholly owned subsidiary of Telecom Italia Sparkle S.P.A. ("TIS"), a leading provider of international

telecommunications, including mobile and voice, data and Internet services. TIS is a company formed under the laws of Italy with a primary place of business in Rome, Italy. TISNA was initially granted international Section 214 authority under the name Telecom Italia of North America (“TINA”).⁴ By letter dated September 7, 2004, TINA notified the FCC of the name change to Telecom Italia Sparkle of North America, Inc., pursuant to Section 63.21(i).⁵

TISNA purchases and sells, on a wholesale basis, minutes of international termination of telecommunications traffic to other wholesale telecommunications carriers and certain large carrier-like customers. TISNA does not knowingly terminate telecommunications traffic to the United States, does not knowingly handle traffic that originates in the United States, and does not provide telecommunications within the United States. With few exceptions, TISNA’s customers deliver traffic to TISNA in Internet protocol (IP) format.

B. The USAC Audit Report

By letter dated May 14, 2014, USAC’s Internal Audit Division initiated an audit of TISNA’s 2013 Form 499A reporting calendar year 2012 revenues.⁶ Despite maintaining a very lean corporate staff, TISNA cooperated fully in all aspects of the audits, including making personnel available for interviews and responding to all USAC questions and data requests. USAC provided its draft audit findings to TISNA on April 30, 2015 and TISNA conducted a detailed review of its records and FCC Form 499A before submitting its written responses to USAC’s proposed findings. TISNA’s responses explained that its services were provided for the

⁴ See Public Notice, “Streamlined International Applications Accepted for Filing, File No. ITC-214-20000523-00313 et al., Report No. TEL-00241S (rel. June 7, 2000).

⁵ See Letter from Troy F. Tanner, Counsel to Telecom Italia Sparkle of North America, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 7, 2004).

⁶ See Letter from Wayne Scott, USAC to Joseph Rubio, TISNA, dated May 14, 2014.

benefit of foreign end users, not for domestic U.S. customers and therefore the associated revenues would appropriately be reported on line 418.3 of the 499A. Moreover, TISNA noted that it receives the majority of customer traffic at points outside the United States. TISNA's response and supplemental information were included in USAC's Final Audit Report approved by the USAC Board of Directors and sent to TISNA on October 28, 2015.⁷ The Final Audit Report directed TISNA to submit a revised FCC Form 499A reflecting the audit findings and notified TISNA of the right to appeal the audit findings. TISNA appealed the Final Audit Report to USAC in accordance with Commission rule 54.719(b) and that appeal was denied on May 3, 2016.⁸ As discussed further herein, TISNA hereby appeals the USAC Administrator's decision regarding certain of those audit findings.

C. The Commission Is Required to Conduct a *De Novo* Review of USAC's Findings and Other Matters

The Commission's rules require the Commission to review, *de novo*, any request for review of a decision of the USAC Administrator.⁹ Unlike appellate review of FCC decisions, no deference is due to USAC or its conclusions in the underlying audit. The Commission has stated repeatedly that USAC is authorized only to act as an administrator of the Universal Service Fund program. The Commission's rules caution that "[t]he Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress."¹⁰

As a consequence, USAC is not permitted to exercise discretion or resolve issues for which the rules are unclear. It is instead tasked solely with implementing the rules and directives

⁷ See Final Audit Report at 8-12.

⁸ See 47 C.F.R. § 54.719(b). See also *USAC Administrator's Decision*.

⁹ See 47 C.F.R. § 54.723.

¹⁰ 47 C.F.R. § 54.702(c).

of the FCC. Consequently, USAC rulings do not have the force of law and are not subject to deference. The Supreme Court, for example, held that *Chevron* deference does not apply where “there is no indication that Congress meant to delegate authority [to the agency to issue] rulings with the force of law.”¹¹ This principle applies with equal – if not more – force to the actions of USAC, which is prohibited by FCC rules from engaging in policymaking of any kind. For that reason, the Commission’s rules state that the Commission will review *de novo* the questions presented on appeal of USAC audit findings.¹²

Furthermore, this appeal requires the FCC to consider the merits of the questions presented, and not merely to verify that USAC followed appropriate procedures. The Commission has stated that it will not automatically uphold a USAC decision, without review, just because USAC was found to be acting within its authority:

[W]e conclude that USAC decisions, whether considered by the Bureau or the Commission, should be subject to *de novo* review. Accordingly, we decline to adopt USAC’s and SLC’s recommendation that the Commission uphold USAC decisions without considering the merits of the appeal if the Commission finds that USAC has not exceeded its authority and has acted consistently with the Commission’s rules.¹³

Accordingly, the mere use of auditing processes or consideration of supplied information is not sufficient to uphold a USAC decision. Similarly, USAC’s exercise of its audit authority, as

¹¹ *United States v. Mead Corp.*, 533 U.S. 218, 231-32 (2001); *cf.* Earl Bonfield, State Administrative Policy Formulation and the Choice of Lawmaking Methodology, 42 Admin. L. Rev. 121, 134 (Spring 1990) (courts “need not give any deference to [agency interpretive rulemaking] because no discretion to create binding law on that subject was expressly or impliedly delegated to the agency”).

¹² 47 C.F.R. § 54.723.

¹³ *In re: Changes to the Board of Directors of the National Exchange Carrier Assoc., Inc.; Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21, 96-4513, Third Report and Order in CC Docket No. 97-21, Fourth Order on Reconsideration in CC Docket No. 97-21, and Eighth Order on Reconsideration in CC Docket No. 96-45, FCC Rcd 25058, ¶ 69 (1998) (“1998 USAC Review Order”).

prescribed by FCC rules, also does not justify sustaining USAC's audit decision. The Commission's review of the findings and other matters on appeal requires it to go beyond the procedures used by USAC, and reach the merits of the questions presented.

Below, TISNA identifies the findings and other matters for which it seeks *de novo* review. As required by 47 CFR § 54.721(b), this Request contains a description of the issues presented for review, the relevant USAC findings, a statement of facts, a summary and a detailed argument.

II. ISSUE: ARE TISNA'S REVENUES, THAT WERE RECEIVED FROM FOREIGN TERMINATION OF TRAFFIC PROVIDED FOR THE BENEFIT OF NON-U.S. END USERS OR THAT WERE RECEIVED OUTSIDE OF THE UNITED STATES, APPROPRIATELY CLASSIFIED AS NON-U.S. TELECOMMUNICATIONS REVENUES?

TISNA seeks *de novo* review of USAC's finding reclassifying TISNA's non-U.S. telecommunications foreign termination service as ordinary international service. TISNA provided its Foreign Carrier Customers with termination, to foreign points, of telecommunications traffic originated by foreign end users in foreign points, passed to foreign carriers for termination in foreign points, for the benefit of foreign end users, and billed to foreign end users by TISNA's Foreign Carrier Customers.¹⁴ USAC reclassified the revenues from TISNA's Foreign Carrier Customers on the grounds that the traffic was received in the United States and therefore the service was ordinary international telecommunications subject to regulatory support fund contributions. TISNA asserts it provided non-U.S. telecommunications service and the revenues are from non-U.S. end users. USAC's reclassification ignores the FCC's determination that USF applies only to revenues derived from domestic end users. Moreover, these services and their end users lack the nexus to the United States necessary for the

¹⁴ See Declaration of Mark Gasbarra, ¶ 7 ("Gasbarra Declaration"). (Attached as Exhibit 3)

revenues to be assessed for purposes of regulatory support contributions. Finally, after further review of its records, TISNA identified additional information to support its assertion that it receives the foreign-bound traffic outside the United States and therefore the associated revenues are non-U.S. telecommunications revenues, reportable on line 418.3 of Form 499A.

A. Statement of Facts

TISNA has numerous reseller carrier customers for which it provides foreign termination services for international direct dialed traffic. With the exception of a few customers utilizing time division multiplexing as backup circuits, TISNA handles only IP telecommunications traffic.¹⁵ TISNA can receive IP traffic from its customers at session border controllers (“SBC”) inside and outside of the United States but TISNA does not knowingly handle traffic that originates in the U.S.¹⁶ Moreover, TISNA does not provide interstate or intrastate telecommunications in the United States.¹⁷ [BEGIN CONFIDENTIAL]

[END

CONFIDENTIAL]

¹⁵ Final Audit Report at 9.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 10.

¹⁹ See Gasbarra Declaration, ¶ 9.

TISNA bills its Foreign Carrier Customers, at their foreign addresses, for the foreign termination services TISNA provides²⁰ and TISNA understands that they, in turn bill their own foreign end user customers for the services provided.²¹ Accordingly, for the foreign termination services it provided in 2012, TISNA understood that the revenue from its Foreign Carrier Customers was attributable to traffic that both originated and terminated in foreign points for the benefit of foreign end users located in foreign points.²² During the time period covered by the audit, TISNA did not knowingly handle traffic that originated in the U.S. for its Foreign Carrier Customers.²³

Moreover, upon further review of its records, TISNA has determined that the vast majority of the foreign termination services it provides for its Foreign Carrier Customers is for traffic that TISNA received outside the U.S. at [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] TISNA also processes a small amount of its Foreign Carrier Customer traffic through an SBC in [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL]

As relevant for this Appeal, [BEGIN CONFIDENTIAL]

²⁰ Final Audit Report at 10.

²¹ See Declaration of Joseph Rubino, ¶ 11. ("Rubino Declaration") (Attached as Exhibit 4)

²² 1998 USAC Review Order, ¶¶ 7-8.

²³ Final Audit Report at 9.

²⁴ See Gasbarra Declaration, ¶ 12.

²⁵ See Gasbarra Declaration, ¶ 12.

²⁶ See Rubino Declaration, ¶ 6.

[END

CONFIDENTIAL] TISNA reported [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] for services provided in 2012 on Line 314 of its FCC Form 499A in 2013.²⁸ As TISNA explained in its response to USAC's draft audit findings, upon review of its records, TISNA determined these non-U.S. telecommunications revenues should have been reported on Line 418.3 of the FCC Form 499A.²⁹

B. Summary of Argument

In its Products Detailed Audit Finding ("DAF"), USAC concluded that foreign termination revenues from all but one of the reseller customers USAC reviewed was attributable to ordinary international service and should be reported on line 414.1.³⁰ In brief, USAC concluded the foreign termination traffic, for all but one of the reviewed customers, was received in the United States and therefore the service was ordinary international service.³¹ USAC asserted TISNA received traffic from its Foreign Carrier Customers in the United States and therefore, there was a United States nexus sufficient to assess USF contributions.³² Moreover,

²⁷ See Rubino Declaration, ¶ 6.

²⁸ See Rubino Declaration, ¶¶ 6, 8, 9. TISNA still provides these services for [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]. However, TISNA ceased providing services for [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]

²⁹ See Rubino Declaration, ¶ 10.

³⁰ Final Audit Report at 12-13.

³¹ *Id.* at 12-13.

³² *Id.*

USAC argued *Goldberg v. Sweet*³³ was inapplicable as that case involved state imposition of a tax on interstate service, not FCC assessment of an international service.³⁴

Contrary to USAC's conclusion, TISNA asserts it received the vast majority of the traffic from its Foreign Carrier Customers at foreign points. As such, that traffic was non-U.S. telecommunications and there was no United States nexus with respect to that traffic and associated revenues.³⁵ Furthermore and in any event, the foreign termination services TISNA provides are for the benefit of foreign end users in foreign points.³⁶ The FCC has stated that USF-subject revenues are those obtained from domestic end users,³⁷ not the revenues where, as here, the service is provided for the benefit of, and billed to, foreign end users. Finally, consistent with *Goldberg* and the 2000 Mobile Telecommunications Sourcing Act (MTSA), the appropriate taxing jurisdiction, if any, is based on the foreign point where those customers are located or use the service.³⁸

Accordingly, TISNA requests the FCC reject USAC's reclassification of the revenues from TISNA's Foreign Carrier Customers which TISNA explains should be classified as non-U.S. telecommunications.

C. USAC Findings and Points for Appeal

Among other findings, USAC found that TISNA [BEGIN CONFIDENTIAL]

³³ *Goldberg v. Sweet*, 488 U.S. 252 (1985).

³⁴ See Final Audit Report at 16.

³⁵ *Id.* at 10.

³⁶ *Id.*

³⁷ 47 C.F.R. § 54.709(a)(1).

³⁸ See discussion *infra* at Section II.E.

[END CONFIDENTIAL]³⁹ TISNA's Foreign Carrier Customers and their associated revenues were included in this finding. The Audit Report found that TISNA did not receive the traffic outside the United States but, instead, received the traffic in the United States before terminating it to a foreign point.⁴⁰ As a result, USAC concluded that TISNA was providing ordinary international service and should have reported the related revenues on line 414.⁴¹ It was only with regard to TISNA's service to [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] that USAC agreed the traffic was received outside of the United States and was therefore non-U.S. telecommunications reportable on line 418.3.⁴² USAC concluded the revenues from the Foreign Carrier Customers were received within the United States and should have been reported as ordinary international revenues on line 414.⁴³

D. USAC Improperly Classifies TISNA's Non-U.S. Telecommunications Service as Ordinary International Service

1. USAC Misclassified Service Provided for the Benefit of Foreign End Users as Ordinary International Service Subject to USF Contributions

USAC mistakenly classified non-U.S. telecommunications service, that was provided for the benefit of foreign end users and was billed to those foreign end users, as ordinary international telecommunications service. TISNA provides only foreign termination of service

³⁹ See Final Audit Report at 3. A total of [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] of that revenue was attributable to its Foreign Carrier Customers. See Rubino Declaration, ¶ 9.

⁴⁰ See Final Audit Report at 13.

⁴¹ See Final Audit Report at 13.

⁴² *Id.* at 14-15.

⁴³ *Id.* at 15.

that originates outside of the United States.⁴⁴ TISNA's Foreign Carrier Customers used TISNA's service to enable traffic originated by their foreign end users, in foreign points, to be terminated in foreign points. TISNA received the vast majority of its Foreign Carrier Customers' traffic at TISNA's facilities located outside of the United States and [BEGIN
CONFIDENTIAL]

[END CONFIDENTIAL] TISNA bills its Foreign Carrier Customers at their foreign corporate offices and TISNA understands its Foreign Carrier Customers, in turn, bill their foreign end users for the services they provide.⁴⁶

The Commission has been clear about its position regarding revenues billed to foreign end users. As early as 1997, in the initial Universal Service Fund order, the Commission stated:

*Revenues from communications between two international points or foreign countries would not be included in the universal service base, for example, if a domestic end user used country direct calling between two foreign points. We find the carriers that provide only international telecommunications services are not required to contribute to universal service support mechanisms because they are not telecommunications carriers that provide interstate telecommunications services.*⁴⁷

Two years later, the Commission declined to further address this treatment of international service offerings, stating "[p]ending a Commission ruling, interstate carriers should continue to

⁴⁴ Final Audit Report at 9. TISNA [BEGIN CONFIDENTIAL]
[END
CONFIDENTIAL] See Gasbarra Declaration, ¶ 6.

⁴⁵ See Gasbarra Declaration, ¶ 9.

⁴⁶ See Rubino Declaration, ¶ 11.

⁴⁷ Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd. 8776, 9174, ¶ 779 (1997) (emphasis added).

report their international revenue *from domestic end users* as directed in the worksheet instructions.”⁴⁸ In 2002, the Commission further clarified its rules by amending section 54.706(a)(1) on computing the required contributions to universal service support mechanisms. Specifically, the Commission determined “[b]eginning April 1, 2003, the subject revenues will be contributors’ projected collected interstate and international revenues derived from domestic end users for telecommunications or telecommunications services, net of projected contributions.”⁴⁹ The rule has since been renumbered to 54.709(a)(1) but the rule text remains unchanged.⁵⁰

These statements and rule 54.709 make clear that revenues from service for the benefit of and billed to foreign end users are not to be counted as U.S. telecommunications for purposes of any of the regulatory support funds. Here, because TISNA provided service to its Foreign Carrier Customers that is used to serve their own foreign end users and those foreign end users are ultimately billed of the service, the revenues from the Foreign Carrier Customers should properly have been reported as non-U.S. telecommunications revenue on line 418.3 of the FCC Form 499A.

E. Even if the Commission’s Rules were Unclear, the FCC Could Not Assess Contributions Based on Foreign Revenues

Even if the FCC’s rule did not clearly identify *domestic* end user revenue as the relevant USF contribution base, TISNA’s Foreign Carrier Customers lack the required nexus with the

⁴⁸ 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms (“Regulatory Review”), Report and Order, 14 FCC Rcd. 16602, 16616, para. 28 (1999) (emphasis added); 47 C.F.R. § 54.709(a)(1).

⁴⁹ *Federal-State Joint Board on Universal Service*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd. 24952, Appendix A (2002).

⁵⁰ 47 C.F.R. §54.709(a)(1).

United States, under *Goldberg v. Sweet*, to make those revenues subject to assessment for the regulatory support funds.⁵¹ USAC stated *Goldberg* was inapplicable because the case addressed a state's imposition of tax on interstate telecommunications services and that TISNA's alleged receipt of the traffic in the United States created sufficient United States nexus justifying imposition of the regulatory support fund contributions.⁵² However, as discussed in Section F, *infra*, TISNA asserts it received the vast majority of its Foreign Communications Carriers traffic outside of the United States. Therefore, the traffic was non-U.S. telecommunications and there was no United States nexus with respect to those revenues that would justify subjecting them to USF contribution requirements. Moreover, TISNA argues that USAC failed to consider the broader message in *Goldberg* of the need for a nexus between a taxing jurisdiction and the service user before a tax can be assessed on the service revenues.

Under *Goldberg v. Sweet*,⁵³ the Supreme Court determined that only two states have a nexus substantial enough to tax a consumer's purchase of an interstate telephone call: "The first is a state that taxes the origination or termination of an interstate telephone call charged to a service address within the state ... [and] the second is a state that taxes the origination or termination of an interstate telephone call billed or paid within that state."⁵⁴ *Goldberg* conceptualizes a "nexus substantial enough" as the critical threshold to taxation.⁵⁵ Congress further codified a similar nexus concept in the 2000 Mobile Telecommunications Sourcing Act

⁵¹ *Goldberg*, 488 U.S. 252, 263.

⁵² Final Audit Report at 16.

⁵³ *Goldberg*, 488 U.S. 252, 263.

⁵⁴ *Id.*

⁵⁵ *Id.*

(“MTSA”), finding that the authorized taxing jurisdiction is based on the customer’s primary place of use of the service:

All charges for mobile telecommunications services that are deemed to be provided *by the customer's home service provider* under sections 116 through 126 of this title *are authorized to be subjected to tax, charge, or fee by the taxing jurisdictions whose territorial limits encompass the customer's place of primary use, regardless of where the mobile telecommunication services originate, terminate, or pass through, and no other taxing jurisdiction may impose taxes, charges, or fees on charges for such mobile telecommunications services.*⁵⁶

The MTSA reflects the federal government’s use of a “nexus” prerequisite for taxation jurisdiction, similar to the nexus prerequisite discussed in *Goldberg*. In the MTSA, Congress determines taxation jurisdiction based on a particular nexus between the end user of the service and the taxing authority and that nexus is based on the *customer's home service provider* and *primary place of use of the service*.⁵⁷

USAC suggests that *Goldberg* involved the jurisdiction of a state to impose a tax on interstate telecommunications, not the authority of the federal government to tax international communications.⁵⁸ However, the principles enunciated in *Goldberg* apply equally to the federal government’s power *vis a vis* foreign traffic as they do to a state’s jurisdiction over traffic outside that state. The revenues from TISNA’s Foreign Carrier Customers are attributable to telecommunications traffic that neither originates nor terminates in the United States. Moreover, the services are not charged to service addresses nor billed in the United States. Accordingly, and consistent with reliance on nexus in the determination of taxation jurisdiction under

⁵⁶ 4 U.S.C. § 117(b), 114 Stat. 627 (emphasis added).

⁵⁷ 4 U.S.C. § 117(b) (emphasis added).

⁵⁸ See Final Audit Report at 16.

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Goldberg, taxation is appropriate only by the foreign jurisdictions where the calls originate and terminate or are billed. Because TISNA's Foreign Carrier Customers and those carriers' foreign end users are foreign in nature, it is those foreign jurisdictions that should determine whether to tax the communications.

Moreover, TISNA asserts there also is no nexus between its Foreign Carrier Customers' end users and the United States under the MTSA's standard. The revenues from TISNA's Foreign Carrier Customers are attributable to foreign-originated international telecommunications service provided by the Foreign Carrier Customers to their foreign end users. The end users for TISNA's foreign termination services are the foreign end users originating the traffic and the Foreign Carrier Customers are the "home service providers" for those customers. The Foreign Carrier Customers use TISNA's foreign termination services to enable their foreign end users to terminate traffic to foreign points. TISNA does not terminate that traffic to the United States. Accordingly, the "*primary place of use of the service*" is likely the foreign point where the traffic is originated but, in any event, is *not* the United States. Consequently, there is no nexus between the FCC and end users of the service TISNA provides to its Foreign Carrier Customers. Therefore, the revenues from those services are not subject to USF assessments and are appropriately reported as non-U.S. telecommunications revenues on line 418.3 of the FCC Form 499A.

1. The traffic originates and terminates outside of the United States

Under the standards established by *Goldberg* and the MTSA, the foreign termination services TISNA provides to its Foreign Carrier Customers lack a sufficient nexus to the U.S., meaning that they are not assessable for USF contribution purposes. TISNA is not rendering services in the U.S.; rather it is using interconnected VoIP to provide its foreign carrier

customers with foreign termination of international-originated direct dialing traffic.⁵⁹

Accordingly, the traffic does not originate from or terminate to points within the United States.

Thus, the revenues associated with TISNA's foreign termination services are appropriately classified as revenues from non-U.S. telecommunications and should be included in TISNA's line 418 revenues which are exempt from assessment by the universal service support funds.⁶⁰

2. *The traffic is not billed in the United States*

As outlined in *Goldberg*, the appropriate jurisdiction to tax communications is the jurisdiction in which the service is billed. TISNA does not bill its Foreign Carrier Customers in the United States. TISNA bills the Foreign Carrier Customers at issue in the foreign points where those carriers are located. For example, TISNA sends invoices to [BEGIN

CONFIDENTIAL]

[END CONFIDENTIAL]

for TISNA's role in terminating traffic that originates from those countries to the requested foreign destination points.⁶¹ Under *Goldberg* – and consistent with Congress' expectation of a nexus, as seen in the MTSA – [BEGIN CONFIDENTIAL]

[END

CONFIDENTIAL] would be the appropriate jurisdictions, if any, to levy assessments on

revenues from the services. In addition, TISNA's Foreign Carrier Customers bill their own end

⁵⁹ The traffic at issue originates, from foreign points, by the foreign end users of TISNA's Foreign Carrier Customers and TISNA terminates this traffic to the foreign destinations requested by its Foreign Carrier Customers. *See* Gasbarra Declaration, ¶ 11.

⁶⁰ The Commission has recognized in other contexts that revenues from traffic with an even greater nexus to the U.S. than the traffic at issue in this Appeal should be reported as foreign revenues. *See* Filing Manual for Section 43.62 Annual Reports, International Bureau, 12-13 (Feb. 2016) ("A Foreign-Billed [International Calling Service ("ICS")] call is an ICS call that originates or terminates with an end-user in the United States, and that is billed by a Foreign Service Provider. The U.S. International Service Provider that provides International Call Completion Service to the United States for a Foreign-Billed ICS call must report the call as Foreign-Billed ICS pursuant to section 43.62 of the Commission's rules.").

⁶¹ *See* Rubino Declaration, ¶ 11.

users, which are located in foreign countries, for the service the Foreign Carrier Customers provide. Again, under the nexus standards established by *Goldberg* and the MTSA, those foreign jurisdictions would have the appropriate nexus to assess taxes on the revenue from the communications traffic that originates from end users in those foreign points.

3. *The traffic is not for the benefit of domestic end users and therefore the revenues are not domestic end user revenues which could be subject to assessment by the TRS, NANPA and LNPA funds*

As explained in Section II.D, *supra*, the beneficiaries of TISNA's foreign termination services are its Foreign Carrier Customers' foreign end users whose calls originate from, and are terminated to, foreign points. TISNA does not provide either intrastate or interstate domestic termination. Accordingly, it is not terminating traffic to the United States for the benefit of a domestic end user. Moreover, [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] As such, the revenues from this traffic are not revenues from service provided for the benefit of domestic end user customers and the revenues are appropriately classified as non-U.S. telecommunications revenues, not ordinary international service revenues subject to assessment by the universal service support funds. USAC therefore is improperly attributing revenues from service provided for the benefit of these Foreign Carrier Customers' end users as ordinary international revenue instead of as non-U.S. telecommunications revenues reportable on line 418.

- F. **Because TISNA Received the Vast Majority of its Foreign Carrier Customers' Traffic Outside of the United States, the Revenues are Attributable to Non-U.S. Telecommunications Service and Must Be Reported on Line 418.3**

REDACTED FOR PUBLIC INSPECTION

A recent review of TISNA's records identified data supporting TISNA's assertion that it received its Foreign Carrier Customers' traffic outside of the United States⁶² and, therefore, that traffic is appropriately classified as non-U.S. telecommunications.

The 2013 Form 499A Instructions state that international settlements and "settlement-like" receipts for foreign-billed service are excluded from U.S. telecommunications revenues.⁶³

The Bureau further clarified what constitutes "settlement-like" receipts in this context, stating:

*For example, if a filer receives payment from a foreign carrier for traffic that the filer receives outside of the United States, brings into the United States, and then refiles and carries to a foreign point, the filer would not include those settlement-like payments as revenues on Line 414 of the FCC Form 499-A even though they might be reported as revenues on the filer's 43.61 international traffic data report. Instead, those amounts would be reported on Line 418.*⁶⁴

In its 2013 FCC Form 499A, TISNA reported **[BEGIN CONFIDENTIAL]**
[END CONFIDENTIAL] in revenues from its Foreign Carrier Customers.⁶⁵ For purposes of this Appeal, TISNA conducted a traffic study of the services it provided **[BEGIN CONFIDENTIAL]** **[END**

CONFIDENTIAL]⁶⁶ The review revealed that **[BEGIN CONFIDENTIAL]**

[END CONFIDENTIAL] traffic handled by TISNA was processed through the

⁶² See Gasbarra Declaration, ¶¶ 14-15.

⁶³ See *Instructions to the Telecommunications Reporting Worksheet*, FCC Form 499-A, Section III.C at 14. (emphasis added) In contrast, foreign-bound traffic that is received in the United States is ordinary international service and those revenues are reported as U.S. telecommunications. *Id.*

⁶⁴ *Id.* at 20 (emphasis added).

⁶⁵ See Rubino Declaration, ¶ 9. These revenues were initially reported on line 314 as reseller revenues, but, in its DAF responses, TISNA advised USAC that those revenues should have been reported on line 418.3. *Id.*, ¶ 10. See also Final Audit Report at 9.

⁶⁶ See Gasbarra Declaration, ¶ 14. **[BEGIN CONFIDENTIAL]**
[END CONFIDENTIAL]

[BEGIN CONFIDENTIAL]

[END CONFIDENTIAL]⁶⁷ TISNA

was [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL]⁶⁸ As a general matter, it is common practice for carriers to direct traffic to the closest point of presence in order to minimize latency.⁶⁹

Consequently, depending on the termination point of the traffic, the [BEGIN

CONFIDENTIAL]

[END CONFIDENTIAL] of the traffic may also

have been directed to the [BEGIN CONFIDENTIAL]

[END

CONFIDENTIAL] As such, it is possible that [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] However,

even if the [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] of the

traffic was processed through the SBC in [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] this traffic would be statistically insignificant for purposes of

reporting revenue on Form 499A.⁷² TISNA provides substantially the same types of services to

[BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] currently as it did in 2012.⁷³

As such, TISNA submits that it is highly probable that the vast majority [BEGIN

CONFIDENTIAL]

[END CONFIDENTIAL] traffic

handled by TISNA in 2012 was received outside the United States.⁷⁴

⁶⁷ See Gasbarra Declaration, ¶ 14.

⁶⁸ See Gasbarra Declaration, ¶ 14.

⁶⁹ See Gasbarra Declaration, ¶ 10.

⁷⁰ See Gasbarra Declaration, ¶ 14.

⁷¹ See Gasbarra Declaration, ¶ 14.

⁷² See Gasbarra Declaration, ¶ 14.

⁷³ See Gasbarra Declaration, ¶ 13.

⁷⁴ See Gasbarra Declaration, ¶ 14.

REDACTED FOR PUBLIC INSPECTION

Similarly, TISNA provided foreign termination services for [BEGIN
CONFIDENTIAL] [END CONFIDENTIAL] in 2012 through SBCs in [BEGIN
CONFIDENTIAL] [END CONFIDENTIAL] At the time, TISNA
configured its network so that [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] of the traffic would
be from Europe and consequently, to limit latency, the traffic would be directed to the [BEGIN
CONFIDENTIAL] [END CONFIDENTIAL] As noted above, it is common
practice to direct traffic toward the closest SBC to limit latency.⁷⁸ Accordingly, with [BEGIN
CONFIDENTIAL]

[END CONFIDENTIAL] it is likely that at least [BEGIN CONFIDENTIAL]
[END CONFIDENTIAL] traffic handled by TISNA in 2012 was
processed through the [BEGIN CONFIDENTIAL] [END
CONFIDENTIAL]

All of the Foreign Carrier Customer traffic handled by TISNA is foreign-bound and it is
highly likely that TISNA receives the vast majority of this traffic outside of the U.S.⁸⁰
Accordingly, in 2012, TISNA was providing non-U.S. telecommunications, not “ordinary
international services from the United States” to its Foreign Carrier Customers. Based upon

⁷⁵ See Gasbarra Declaration, ¶ 12.

⁷⁶ See Gasbarra Declaration, ¶ 15.

⁷⁷ See Gasbarra Declaration, ¶ 15.

⁷⁸ See Gasbarra Declaration, ¶ 10.

⁷⁹ See Gasbarra Declaration, ¶ 15.

⁸⁰ See Gasbarra Declaration, ¶¶ 9, 11-12.

TISNA's assessments of [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] and in light of common industry practice to direct traffic to the closest point of presence in order to minimize latency,⁸¹ [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] for services provided in 2012 should not be "reported on Line 414."⁸² Instead, these "settlement-like" payments are non-U.S. telecommunications revenues and must be reported on line 418.3.⁸³

G. Ratification of USAC's Reclassification Would Have Adverse Consequences

TISNA's business is reselling international minutes, a service industry subject to extreme competition, and as such, TISNA operates on very thin margins. USAC's proposed misclassification of TISNA's non-U.S. telecommunications revenues would put TISNA at a significant competitive disadvantage and cause the company great financial harm. The Foreign Carrier Customers have many options for completing their foreign originated traffic. These alternative suppliers, to the best of TISNA's knowledge, are not subject to and do not assess U.S.-based Universal Service or other regulatory support fund charges on their customers. Were TISNA compelled to do so, it would operate at a higher cost than its competitors and would be unlikely to win such traffic in the future. This result would harm TISNA in the international marketplace and could threaten its viability as an entity. Such a result is entirely unjustified, for the reasons stated above. In order to equalize the treatment of foreign traffic, the Commission should reverse USAC's decision with respect to the Foreign Carrier Customers.

⁸¹ See Gasbarra Declaration, ¶¶ 10, 14-15.

⁸² See Rubino Declaration, ¶¶ 6, 8.

⁸³ See 2013 Instructions to the Telecommunications Reporting Worksheet, Form 499A at 20.

III. CONCLUSION

For the forgoing reasons, TISNA respectfully requests that the Commission reverse USAC's decision regarding Audit Report findings on the issues discussed above.

Respectfully submitted,



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Counsel for Telecom Italia Sparkle of North America, Inc.

July 1, 2016

EXHIBIT 1

USAC Internal Audit Division Report on the Audit of Telecom
Italia Sparkle of North America, Inc.

REDACTED

2013 Form 499-A

REDACTED

EXHIBIT 2

Administrator's Decision on Appeal of the Audit of Telecom Italia
Sparkle of North America, Inc.

REDACTED

2013 Form 499-A

REDACTED

EXHIBIT 3

Declaration of Mark S. Gasbarra

REDACTED

REDACTED

CONFIDENTIAL AND PROPRIETARY - NOT FOR PUBLIC INSPECTION

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

DECLARATION OF MARK S. GASBARRA

1. I, Mark S. Gasbarra, am employed with the Customer Operations Group of Telecom Italia Sparkle S.P.A. ("TIS"). In calendar year 2013, I was President of Telecom Italia Sparkle North America, Inc. ("TISNA" or the "Company"). I have 21 years of experience in the telecommunications industry. I have worked for TISNA or its affiliates for 14 years.

2. I am providing this Declaration in support of TISNA's Request for Review ("Request") of the Universal Service Administrative Company's ("USAC") Final Audit Report dated October 28, 2015 and USAC Administrator's Decision dated May 3, 2016. USAC's Final Audit Report is the result of an audit ("Audit") of TISNA's 2013 Form 499-A Telecommunications Reporting Worksheet (the "Form 499-A") reporting calendar year 2012 revenues. The statements in this declaration relate to TISNA's traffic and arrangements in 2012.

3. As explained below, TISNA's principal business involves the sale of international termination services for traffic that originates and terminates outside the United States. TISNA's customer base primarily consists of wholesale telecommunications carriers and carrier-like customers.

BACKGROUND

4. TISNA is a corporation formed under the laws of the State of New York with a primary place of business at 622 3rd Avenue, 38th Floor New York, NY 10017. The Company is a wholly owned subsidiary of TIS, a leading provider of international telecommunications,



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including mobile and voice, data and Internet services. TIS is a company formed under the laws of Italy.

5. TISNA holds international Section 214 authority, from the Federal Communications Commission ("FCC"), permitting TISNA to provide international telecommunications from the United States to all foreign points with the exception of San Marino. See, ITC-214-20111228-00386 (granting authority to serve Cuba); ITC-214-20030716-00357 (granting authority to serve Serbia and Montenegro); and ITC-214-20000523-00313 (granting authority to serve all foreign points except to Cuba, San Marino and the Federal Republic of Yugoslavia (Serbia and Montenegro). TISNA was initially granted international Section 214 authority under the name Telecom Italia of North America ("TINA"). By letter dated September 7, 2004, TINA notified the FCC of the name change to Telecom Italia Sparkle of North America, Inc.

TISNA'S SERVICES

6. TISNA is a provider of international telecommunications, on a wholesale basis, to other telecommunications carriers and carrier-like customers. TISNA does not terminate any telecommunications to the United States nor does the Company provide telecommunications within the United States (*i.e.*, intrastate or interstate telecommunications). Further, **[BEGIN CONFIDENTIAL]**

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CONFIDENTIAL AND PROPRIETARY - NOT FOR PUBLIC INSPECTION

[END CONFIDENTIAL] TISNA's primary business is as an intermediate carrier facilitating the termination of international traffic to foreign points. TISNA purchases and sells, on a wholesale basis, minutes of international termination of telecommunications traffic. TISNA takes traffic from its customers, that originates outside the United States (or originates from points that cannot be determined), and routes the traffic for termination to international points.

8. As an intermediate wholesale provider, TISNA sometimes coordinates the termination of traffic that **[BEGIN CONFIDENTIAL]**

[END CONFIDENTIAL]

9. IP traffic sent to TISNA is received at a Session Border Controller (SBC).

[BEGIN CONFIDENTIAL]

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[END CONFIDENTIAL]

10. To the best of my knowledge, I understand that it is common practice for carriers to direct traffic to the closest point of presence in order to minimize latency.

11. In 2012 TISNA provided its international termination services to several carriers including **[BEGIN CONFIDENTIAL]**

[END CONFIDENTIAL]

12. Upon review of its records, TISNA determined that **[BEGIN CONFIDENTIAL]**

[END CONFIDENTIAL] both

originates and terminates outside the U.S.

13. **[BEGIN CONFIDENTIAL]**

[END CONFIDENTIAL]

14. TISNA recently conducted a traffic study of the services provided **[BEGIN CONFIDENTIAL]**

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[END CONFIDENTIAL]

15. TISNA configured its network so that [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] of the

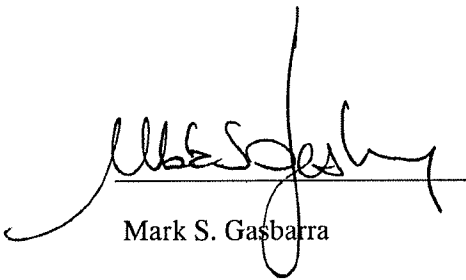
traffic would be from Europe and consequently, to limit latency, the traffic would be directed to

[BEGIN CONFIDENTIAL]

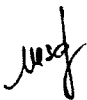
[END CONFIDENTIAL]

I hereby declare under penalty of perjury that the foregoing declaration is true and correct to the best of my knowledge and belief.

Dated this 1 day of July, 2016



Mark S. Gasbarra



TISNA Summary of Traffic

Exhibit A to Declaration of Mark S. Gasbarra

REDACTED

EXHIBIT 4

Declaration of Joseph Rubino

REDACTED

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

REDACTED

DECLARATION OF JOSEPH RUBINO

1. I, Joseph Rubino, am Chief Financial Officer of Telecom Italia Sparkle North America, Inc. (“TISNA” or the “Company”). I have 31 years of experience in the telecommunications industry. I have worked for TISNA or its affiliates for 31 years.

2. I am providing this Declaration in support of TISNA’s Request for Review (“Request”) of the Universal Service Administrative Company’s (“USAC”) Final Audit Report dated October 28, 2015 and USAC Administrator’s Decision dated May 3, 2016. USAC’s Final Audit Report is the result of an audit (“Audit”) of TISNA’s 2013 Form 499-A Telecommunications Reporting Worksheet (the “Form 499-A”) reporting calendar year 2012 revenues.

3. The statements in this declaration relate to TISNA’s revenues in 2012.

BACKGROUND

4. TISNA is a corporation formed under the laws of the State of New York with a primary place of business at 622 3rd Avenue, 38th Floor New York, NY 10017. The Company is a wholly owned subsidiary of Telecom Italia Sparkle S.P.A. (“TIS”), a leading provider of international telecommunications, including mobile and voice, data and Internet services. TIS is a company formed under the laws of Italy.

TISNA's CUSTOMER BASE AND BILLING OF SERVICE

REDACTED

5. In 2012 TISNA received revenues from several carriers including

[BEGIN CONFIDENTIAL]

[END CONFIDENTIAL]

10. TISNA reported these revenues on line 314 of the 2013 FCC Form 499A.

During the audit, TISNA determined these revenues were attributable to non-U.S.

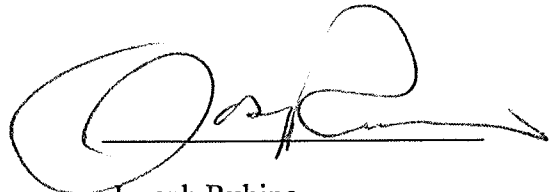
telecommunications and should have been reported on line 418.3 of the Form 499A.

11. TISNA billed **[BEGIN CONFIDENTIAL]**

[END CONFIDENTIAL] in turn, billed their end user customers for the service.

I hereby declare under penalty of perjury that the foregoing declaration is true and correct to the best of my knowledge and belief.

Dated this 1 day of July, 2016

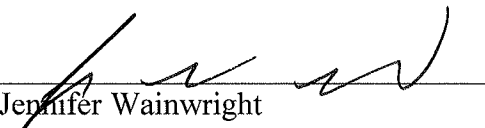


Joseph Rubino

CERTIFICATE OF SERVICE

I, Jennifer Wainwright, hereby certify that on this 1st day of July, 2016, I caused a true and correct copy of the foregoing **Telecom Italia Sparkle of North America, Inc. Request for Review of Decision of the Universal Service Administrator** to be served on the following by hand delivery:

Universal Service Administrative Company
2000 L Street, N.W.
Suite 200
Washington, D.C. 20036


Jennifer Wainwright